STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

WPS Energy Services, Inc.	**:**	
	:	
Application for Certificate of	**:**	**00-0199**
Service Authority under Section	**:**	
16-115 of the Public Utilities Act.	**:**	

HEARING EXAMINER'S PROPOSED ORDER ON REOPENING

DATED: April 19, 2001

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By the Commission:

I. PROCEDURAL HISTORY

On March 2, 2000, WPS Energy Services, Inc. ("WPS" or "Applicant"), which is an affiliate of Wisconsin Public Service Corporation ("WPSC") and Upper Peninsula Power Company, filed a verified application with this Commission requesting a certificate of service authority in order to become an alternative retail electric supplier ("ARES") in Illinois pursuant to Section 16-115 of the Public Utilities Act ("Act") and 83 Ill. Adm. Code 451 ("Part 451").

Petitions for leave to intervene were filed on April 4, 2000 by Peoples Energy Services Corporation ("PE Services"), an ARES, and on April 11, 2000 by Commonwealth Edison Company ("ComEd"), and a responsive filing was made by WPS. These intervening petitions were granted subject to the provisions of Section 16-115(d) and other sections of the Act.

An Order was entered by the Commission on April 18, 2000. Subject to certain conditions, that Order granted an ARES certificate to Applicant for the service territories of ComEd and three other electric utilities. The Commission granted rehearing, but other parties chose not to participate, and the original decision was affirmed on July 6, 2000.

On March 16, 2001, the Commission entered an Order Reopening Proceeding to consider and determine, on an expedited basis, whether it should rescind, alter or amend the Order it entered in this proceeding on April 18, 2000, with the scope of the reopening limited to further consideration of whether WPS meets the reciprocity standards set forth in Section 16-115(d)(5) of the Act.

On March 19, 2001 a petition for leave to intervene was filed by Blackhawk Energy Services, L.L.C. ("Blackhawk"), and this intervening petition was granted subject to the provisions of Section 16-115(d) and other sections of the Act.

On March 23, 2001 a Staff report was filed as directed in the Commission's Order Reopening Proceeding. On March 27, 2001 WPS filed a response to the Staff Report. Local Unions 15, 51 and 702 of the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") filed a petition for leave to intervene and comments of counsel. The Illinois Retail Merchants Association ("IRMA") also filed a petition for leave to intervene. A petition for leave to intervene and comments, were jointly filed by State Representatives Kurt M. Granberg, J. Philip Novak and Vincent A. Persico, and State Senator Denny Jacobs ("Joint Legislator Intervenors"). On March 27, 2001 an intervening petition was also filed by the Illinois Energy Association ("IEA"). On March 29, 2001 the Citizens Utility Board ("CUB") filed an intervening petition and comments of counsel in response to the Staff Report. An intervening petition and comments were also filed on that date by State Senator Steve Rauschenberger. WPS filed a motion to deny the IEA petition for leave to intervene and a response to the IBEW petition for leave to intervene.

On March 28, 2001 WPS filed a motion to set aside the Commission's Order Reopening Proceeding. A response thereto was filed by Staff on April 3, 2001. Also on April 3, Enron Energy Services Inc. ("Enron") filed a Petition to Intervene and a response in support of the motion of WPS. This motion and responses thereto are discussed in more detail later in this order.

Hearings on reopening were held on March 26 and April 5, 2001. At one or both of these hearings, appearances were entered by WPS, Staff, IBEW, Representative Kurt M. Granberg, CUB, ComEd and PE Services, Blackhawk and Enron. Staff presented the testimony of Bruce A. Larson and WPS presented the testimony of Chris Matthiesen. At the conclusion of the April 5 hearing, the record was marked "Heard and Taken" on reopening.

Post hearing briefs were filed by WPS, Blackhawk, IBEW and Staff. A hearing examiner's proposed order was served on the parties on April 19, 2001.

II. APPLICABLE STATUTORY PROVISIONS

At issue in this proceeding on reopening is the proper interpretation and application of reciprocity provisions of Section 16-115(d) which reads in part as follows:

> (d) The Commission shall grant the application for a certificate of service authority if it makes the findings set forth in this subsection based on the verified application and such other information as the applicant may submit:
>
> * * * * *
>
> (5) That if the applicant, its corporate affiliates or the applicant's principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the

> transmission or distribution of electricity to end-users *within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered*, the applicant, its corporate affiliates or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this Section. For purposes of this subparagraph, "principal source of electricity" shall mean a single source that supplies at least 65% of the applicant's electric power and energy, and the purchase of transmission and distribution services pursuant to a filed tariff under the jurisdiction of the Federal Energy Regulatory Commission or a state public utility commission shall not constitute control of access to the provider's transmission and distribution facilities[.]
>
> [220 ILCS 5/16-115(d)(5) (emphasis supplied)]

III. ORDER OF APRIL 18, 2000; ORDER REOPENING PROCEEDING

With regard to the issue of physical delivery within the meaning of Section 16-115(d)(5), the Commission's April 18, 2000 Order found Applicants assertions that electric power and energy cannot be physically delivered to northeast Wisconsin to be unpersuasive.

As explained more fully in the April 18, 2000 Order, WPS presented three analyses for purposes of demonstrating that the Illinois utilities cannot economically deliver power to the service areas of Applicant's affiliates. These analyses were intended to compare the utility rates or costs in those affiliates' areas, on a $/MWh basis, to the delivered cost of serving those customers by the Illinois utility. The first two analyses used market prices as proxies in the calculation of power and energy costs for Illinois utilities, while the third analysis was an incremental cost comparison.

The Commission concluded that both types of analyses, including the incremental cost comparison, were relevant for purposes of assessing the economic delivery standard in Section 16-115(d)(5). The Commission further concluded, regarding the incremental cost analysis, that the Illinois utility's costs should be compared not only to WPSC's incremental cost, but also to WPSC's tariffed industrial rates. On this point, the Commission found that the assertions of the Applicant were insufficient to warrant a finding that Illinois utilities could not reasonably utilize an incremental cost analysis in determining whether they could deliver power to service areas in Wisconsin on an economic basis within the meaning of the reciprocity provisions of Section 16-115(d)(5).

Based on the information presented, the Commission found that it would not be economical, under any of the three methods of analysis presented, for the Illinois utilities in question to deliver electric power and energy to the service areas of Applicant's affiliates. Accordingly, the Commission concluded that the reciprocity provisions of Section 16-115(d)(5) should not preclude the Applicant from receiving an ARES certificate.

In its March 16, 2001 Order Reopening Proceeding, the Commission noted that previously, it had accepted construction of language in Section 16-115(d) which precluded it from considering any information or argument from any entity other than an applicant, at least until after the Commission had entered an order either granting or denying the application. In its March 16, 2001 Order, the Commission stated that in considering whether to take an action as significant as granting an application for a certificate of service authority to an ARES, it now believes it is inappropriate to read the statute as forbidding it to consider information other than that provided by the applicant.

As previously mentioned, on March 16, 2001 the Commission reopened Docket No. 00-0199 to consider and determine, on an expedited basis, whether it should rescind, alter or amend the Order it entered in this proceeding on April 18, 2000, with the scope of the reopening limited to further consideration of whether WPS meets the standards set forth in Section 16-115(d)(5) of the Act. The positions of the parties on this issue are summarized below.

IV. ECONOMIC ANALYSES

A. Staff's Analysis

Staff indicates that in the application filed on March 2, 2000, WPS compared the cost for Illinois utilities to hypothetically serve customers in the WPSC service area (one of WPS' retail affiliates which serves a defined geographic area in Wisconsin) to the rates WPSC charges those same customers. According to Staff, the analysis used three different estimates of costs to Illinois utilities: the Power Purchase Option ("PPO"), market index and incremental cost. Staff reports that these estimates were compared to the average cost to all industrial users, except that ComEd's incremental costs were, in the original Application, compared to the system average for WPSC's generation and the same marginal cost of capacity. (Staff Ex. 1 at 1)

In response to the Commission's March 16, 2001 Order directing Staff to prepare a Report stating whether there are any other sets of assumptions which would assist the Commission in determining whether either of WPS' retail affiliates serves a defined geographic area to which electric power and energy can be physically and economically delivered by the four electric utilities in whose service areas WPS sought to provide ARES service, Staff presented a report and the Affidavit of Bruce A. Larson. The affidavit was marked as Staff Exhibit 1.

Mr. Larson indicates that his analysis considers the impact on customers other than the average customer of WPSC. Mr. Larson states that because WPSC's retail rates contain demand charges, varying customer load factors can result in varying rates. He says the average rate concept does not consider the interplay of demand charges and customer load factors. (Staff Ex. 1 at 1-2; Staff brief at 7)

Mr. Larson developed the table below to demonstrates that cost varies with load factor.

Load Factor (%)	Average Cost ($/MWh)
100	31.5
90	32.4
80	33.6
70	35.1
60	37.2
50	40.0
40	44.2
30	51.3

Mr. Larson indicates that the table is based on current WPSC rates for the Cp-1 industrial rate class because those were the only retail rates available to him. Mr. Larson states that the rate for lower load factor customers is very much higher than the average rate of $32.1 per megawatt-hour ("MWh") used by WPSC. (Staff Ex. 1 at 2; Staff brief at 7-8)

Mr. Larson states that in the documentation accompanying WPS' application, WPS calculated the cost that ComEd would face to serve these customers to be between $32.7 and $42.0 per MWh. Mr. Larson asserts that ComEd's wholesale power costs do not vary as greatly with load factor as do WPSC' retail costs because the retail costs include a demand charge and the wholesale costs do not. According to Mr. Larson, assuming the spread of energy by time of day and by season stays the same with varying load factor, then ComEd's costs are invariant to load factor and WPSC' retail costs vary as shown in the table. Mr. Larson contends there are an unlimited number of combinations of load by time of day and season and that some will have higher costs while others will have lower costs. (Staff Ex. 1 at 2-3; Staff brief at 8)

Mr. Larson asserts that based on calculations he made, comparing WPSC's current tariffed rates and ComEd's Market Value Index tariff currently in place and otherwise using the same assumptions as were set forth in the WPS Application, ComEd's costs would range from $50.7 to $57.7 per megawatt-hour. Mr. Larson concluded that ComEd could economically serve a WPSC retail customer in the Cp-1 rate class at load factors just above 30%, which he says is within the range of probable load factors for certain industrial customers. (Staff Ex. 1 at 2-3; Staff brief at 8-9)

At the April 5, 2001 hearing, Mr. Larson updated his analysis to reflect more current information from ComEd's market value index tariff. He indicated that the updated information caused his estimated cost for ComEd to serve WPSC Cp-1 customers to increase to $58.1 to $61.9 per megawatt-hour. Mr. Larson also stated that under current WPSC rates, Cp-1 customers with a load factor of 25% would pay $57.0 per megawatt-hour and customers with a load factor of 20% would pay $65.5 per megawatt-hour. He concluded, based on this updated information, that ComEd could economically serve a WPSC retail customer in the Cp-1 rate class at load factors just below 25%.

With regard to utilities other than ComEd, Mr. Larson reports that on March 21, 2000, in its response to a request of the hearing examiner, Applicant provided cost comparisons for the other Illinois utilities' territories for which it seeks certification. According to Mr. Larson, Applicant's analysis states that the incremental cost for Illinois Power Company ("IP") is $40.18 to $41.83 per megawatt-hour; that for Central Illinois Public Service Company ("CIPS"), the incremental cost is $36.48 to $38.13 per megawatt-hour; and that for Central Illinois Light Company ("CILCO"), the incremental cost is $41.40 to $43.05 per megawatt-hour. Mr. Larson also claims that if any of these electric utilities purchased electricity at wholesale in ComEd's service area, then based upon the same cost assumptions used in evaluating the feasibility of service by ComEd to a WPSC retail customer, then these electric utilities would have the same ability to economically serve a WPSC retail customer in the Cp-1 rate class at load factors just above 30%. (Staff Ex. 1 at 3; Staff brief at 10)

Mr. Larson says his analysis includes the assumption that Illinois utilities, other than ComEd, purchase wholesale electricity within ComEd's service area for resale to retail customers in WPSC's service area. He says this assumption is in accordance with language in the Commission's Order Reopening Proceeding which requested that Staff not limit itself to considering the sale of electricity from generating resources owned or controlled by these four electric utilities.

On reopening, Mr. Larson says his analysis also included a review of the impact of an Illinois utility's buying wholesale power in WPSC's territory and reselling it at retail. Mr. Larson claims that while this would remove any physical barriers and reduce transmission costs, it does not necessarily reduce the cost of power and energy. He indicates that he has seen no evidence that wholesale prices an Illinois utility would pay in Wisconsin are lower than electricity purchases at wholesale in ComEd's service territory. (Staff Ex. 1 at 3-4; Staff brief at 9)

Mr. Larson states that based on his analysis, ComEd, IP, CIPS and CILCO can economically sell to some of WPSC's Cp-1 customers with load factors less than the class average. (Staff Ex. 1 at 4)

The March 23, 2001 Staff Report states that if the Commission were to determine that the appropriate standard for determining whether or not an Illinois utility could economically deliver power and serve customers in the service territory of an

ARES applicant (or the affiliate of an ARES applicant) was whether that power could effectively compete for even low-load factor customers, then the determination of whether or not the WPS ARES certificate should have been granted in Docket 00-0199 may well have been different. (Staff Report at 1)

B. WPS' Response to Staff

WPS asserts that Staff compared the Power Purchase Option ("PPO") pricing, which does not vary by load factor, to WPSC rates, which do vary by load factor. WPS asserts that the comparison of electric rates based on two completely different methodologies adversely impacts the Staff analysis. (WPS Ex. 1, Attachment 1 at 1)

WPS contends that the WPSC regulated rates, like most regulated utility rates, are designed to recover the costs associated with serving a particular customer. In order to correct for the discrepancy in how the PPO and WPSC regulated rates are structured, WPS says it presented an average customer scenario in the original application for ARES certification. WPS indicates that it averaged the WPSC rates to more accurately compare the two rates involved. By comparing an average ComEd customer, for example to an average WPSC customer, WPS claims it presented information based on like customer profiles. (WPS Ex. 1, Attachment 1 at 1; WPS brief at 3-4)

According to WPS, one flaw in the PPO pricing mechanism is the manner in which it groups industrial customers by demand, irrespective of load factor. WPS says that the effect of the pricing mechanism is that the savings for lower load factor customers do not account for the actual costs associated with serving that type of customer. (WPS Ex. 1, Attachment 1 at 1)

In order to compare the costs associated with serving a 30% load factor customer, WPS claims the PPO pricing needs to be adapted, much like the WPSC rates were adapted in the original application for certification. WPS says the WPSC rates account for the actual costs of serving a 30% load factor customer. To determine the costs associated with serving a 30% load factor customer in other areas, WPS indicates it informally surveyed several wholesale electric providers. WPS says it found that some would charge as much as 47% more to serve a customer with a load factor of 30% than they would charge a customer with an 80% load factor. WPS states that the original application for certification assumed an 80% load factor customer. (WPS Ex. 1, Attachment 1 at 1-2; WPS brief at 4)

WPS asserts that most wholesale electric providers provided percentage increases in the mid-30s and some were hesitant to provide numbers at all without an actual customer load profile to review because the costs can vary based on when the energy is used. WPS says the best price provided by a wholesale electric provider represented a 15% increase to serve a customer with the low load factor. According to WPS, its informal survey showed the PPO pricing used in its original application would

have to be adjusted by 37% to be a reasonable proxy for the actual costs associated with serving a 30% load factor customer. (WPS Ex. 1, Attachment 1 at 2)

WPS indicates that a 37% increase in the ComEd PPO cost would be $61.1 to $63.3 per MWh, or an average of $62.2 per MWh. WPS says the Staff Report showed the average cost for a 30% load factor customer served by WPSC within the WPSC territory is $51.3 per MWh. WPS concludes that it is less expensive for a WPSC customer to purchase power and energy from WPSC than to purchase power provided through the PPO. WPS asserts that even using the least expensive survey response (25% increase), the costs associated with serving this same customer via the PPO program would range between $51.30 to $53.13 per MWh, or an average of $52.22 per MWh. WPS concludes that an Illinois utility cannot economically deliver power and energy to a retail customer in the WPSC service territory. (WPS Ex. 1, Attachment 1 at 2)

According to WPS, Staff argues that the three Illinois utilities, other than ComEd, could purchase power and energy at the ComEd border for the PPO price and therefore could serve customers in WPSC's territory with a load factor of 30% or less. WPS asserts that the theory behind Staff's analysis is erroneous and the application of the data is based on an incorrect assumption and therefore is flawed. (WPS Ex. 1, Attachment 1 at 5)

C. Staff Reply to WPS

According to Mr. Larson, WPS contends that the ComEd PPO should be adjusted for load factor. WPS proposes to make the load factor adjustment based on an informal survey. Mr. Larson states that total results of the survey were not provided. (Staff Ex. 2 at 1)

Mr. Larson indicates that WPS also did not provide the criteria it used to determine which wholesale electric providers it surveyed. Mr. Larson further states that WPS did not provide any other information regarding the survey which could be used to determine the reliability of the survey. Mr. Larson indicates that WPS applied the results of its informal survey to the total cost to serve, not just the cost of power and energy. Finally, Mr. Larson claims it is absurd for WPS to conclude that an Illinois utility with a market cost of $51.3 could not serve a WPSC customer that was charged $51.3 by WPSC. (Staff Ex. 2 at 1-2)

Mr. Larson indicates that WPS recomputed the cost of ComEd using market index prices for a fixed set of on-peak and off-peak usage. However, Mr. Larson contends that there is a wide variety of customers and it is likely that some would have cost structures that favored Illinois utilities. (Staff Ex. 2 at 1)

Mr. Larson concludes that based upon the most recent information filed, WPS has failed to show that Illinois utilities cannot economically serve WPSC customers. (Staff Ex. 2 at 2)

In its brief, Staff indicates that it performed no analysis of the information relied upon in the preparation of either WPS Exhibit 1, Attachment 1 or WPS Exhibit 2, Attachment 1. These analyses by WPS were based upon actual customer usage in the WPSC service area. Staff indicates that it did not have actual customer usage information. Staff states that WPS' witness testified that the information is confidential; that he was unable to obtain the information for himself; and that he was unable to provide the information to Staff. (Staff brief at 9, citing Tr. at 103-104)

D. WPS' Reply to Staff; Blackhawk's Position

WPS witness Mr. Matthiesen asserts that the schedule adopted in this case did not provide time to conduct a formal survey. He indicates that in the informal survey, the question asked was: "By how much would you increase your price for wholesale supply to serve a 30% load factor customer over your price to serve an 80% load factor customer?" (WPS Ex. 2 at 2; WPS brief at 4)

Mr. Matthiesen states that many were hesitant to answer without load data to analyze. He indicates that the six entities who responded represented two Illinois utilities, an Indiana utility, a Wisconsin utility, a retail electric provider operating in the Northeast, and a Michigan utility. Mr. Matthiesen claims that all of the data was provided on a confidential basis because it represents competitive information. (WPS Ex. 2 at 2; WPS brief at 4)

Mr. Matthiesen disagrees with Staff that any incremental cost should have been applied to the cost of power and energy, not to the total cost to serve. Mr. Matthiesen contends that the question asked in the survey sought the total incremental cost and did not seek to identify what portion of that cost would be applied to the cost of the power and energy alone. He also claims that whether the additional cost is booked by the supplier as energy cost, demand, transmission, or other services is irrelevant to this analysis. Mr. Matthiesen states that it is the ultimate cost to serve a customer that prompted Staff to reconsider the impact of the "demand + power & energy" pricing offered by WPSC and the "power & energy only" pricing available through the PPO. (WPS Ex. 2 at 2-3; WPS brief at 5-6)

WPS claims it would be uneconomic for an Illinois utility to serve a WPSC customer if that customer is currently charged $51.3 per MWh and the cost to the Illinois utility to serve that customer is $51.3 per MWh. Mr. Matthiesen asserts that conclusion is valid because the PPO pricing used in WPS' analysis and in the Staff's Report and Comments is the Market Value Index plus transmission costs derived from OATT. Mr. Matthiesen contends that the $51.3 per MWh represents the cost to the Illinois utility, not the price to the proposed customer. In other words, he says no margin is included in the $51.3 per MWh cost to the Illinois utility. By contrast, he says the $51.3 per MWh price charged by WPSC does include the Wisconsin Public Utility Commission's approved margin. (WPS Ex. 2 at 3; WPS brief at 6)

According to Mr. Matthiesen, Staff found that the split of on-peak/off-peak usage was too general, and could leave out a WPSC customer who could be served economically by an Illinois utility. He provided an exhibit which purportedly provides actual $/MWh pricing for every WPSC customer with a demand of 1 MW or more and compares those $/MWh with the pricing available through the PPO. Mr. Matthiesen indicates that the document was prepared by WPSC using the PPO market based rates as presented in the original application for certification by WPS and used by the Staff in its Report filed March 23, 2001 as well the per megawatt-hour price to WPSC customers as calculated by WPSC. Mr. Matthiesen claims that even using Staff's methodology, with which WPS finds fault, not one WPSC customer uses electricity in such a way as to render service by an Illinois utility economic. (WPS Ex. 2 at 4; WPS brief at 6-7)

WPS states that based on an informational filing made by ComEd on April 2, 2001, Mr. Matthiesen updated WPS Exhibit 2, Attachment 1 by presenting a new Exhibit purportedly based on the new PPO prices announced by ComEd. (WPS Ex. 3) WPS indicates that this updated analysis was exactly the same as the analysis conducted in Attachment 1 to WPS Exhibit 2 and also contained a comparison of the differential between the original Exhibit (WPS Exhibit 2) and the new Exhibit (WPS Exhibit 3). WPS asserts that this information further confirms Mr. Matthiesen's original conclusion that not one WPSC customer uses electricity in such a way as to render service by an Illinois utility economical. (WPS brief at 7)

According to WPS, subsequent to the reopening of this matter, the Commission entered an Order in another ARES docket which expressly rejected the same methodology for determining compliance with the reciprocity clause as was put forward by the Staff in its Report in the instant case. (WPS brief at 2, citing Docket 01-0174, Order April 6, 2001, Blackhawk Energy Service LLC) WPS claims its position that it is more costly to serve lower load factor customers than higher load factor customers is supported by the analysis conducted by Blackhawk Energy Services LLC, in Docket 01-0174 and accepted by the Commission in its April 6, 2001 Order in that docket. WPS asserts that Blackhawk, in its application for certification, presented essentially the same argument WPS does here. (WPS brief at 4-5)

In its brief, Blackhawk asserts that the analysis contained in the Staff Report in the instant proceeding is based upon the same analytic framework that was presented by Staff in Docket No. 01-0174 and was rejected by the Commission. Blackhawk contends that since the Staff report in the instant proceeding is flawed, the Commission should again conclude that the Staff Report is not persuasive. (Blackhawk brief at 6-9)

V. THE MEANING OF SECTION 16-115(D)(5) OF THE ACT

A. IBEW's and IEA's Positions

It is IBEW's position that the applicant must provide the "geographic areas" in which it presently provides service are ones "to which electric power and energy can be

physically or economically delivered" by the Illinois utility or utilities in whose area or areas the applicant proposes to offer services. (IBEW response at 1-2)

IBEW claims WPS must show that the transmission and distribution of electricity cannot be economically delivered by Illinois utilities in whose areas WPS wishes to provide electricity to end users, and must further show that the necessary political and administrative actions have been taken in WPS' affiliates' jurisdiction to physically permit the delivery of such electricity by Illinois utilities to end users in WPS' affiliates' service areas. IBEW claims WPS has made no such showing to date in this proceeding. (IBEW response at 2)

IBEW recommends that the Commission use this reopened proceeding to deny any further expansion of WPS' provision of end users' service in any service areas of any Illinois utilities until such time as WPS can make the necessary showing. (IBEW response at 2)

In its brief, IBEW claims that on the key reciprocity question there is no debate. IBEW states that Wisconsin has not opened up the geographic areas served by utilities in its jurisdiction to competition from Illinois public utilities or their affiliates. IBEW further contends that Staff's expert witness testified without challenge that permitting public utilities or their affiliates from states outside of Illinois to sell power directly to Illinois retail customers will hurt the rate of return of Illinois utilities. IBEW also argues that Joint Legislator Intervenors, who were key parties to the negotiations that produced the 1997 Amendments to the Act, have indicated in this proceeding that the reciprocity provision of the Amendments were specifically intended to assure that competition in the Illinois electricity market is conducted on a level playing field. IBEW asserts that without such a provision in the 1997 amendments, the General Assembly recognized that out of state utilities could sell electricity in Illinois while Illinois utilities would be denied a chance to compete in the out of state utilities' service areas. (IBEW brief at 5)

According to IBEW, adoption of the WPS position on reciprocity would be fundamentally unfair to Illinois utilities who by law must serve all customers - large or small - who request electric power in their service area. IBEW contends that without a reciprocity provision, out of state utilities or their affiliates could "cherry pick" only high end or large use customers in the Illinois service areas they wish to enter, while the Illinois utilities would have to maintain their power plants and employees to serve all customers in the same area. IBEW argues that the Illinois utilities' costs would rise while their gross income would go down. (IBEW brief at 5)

IBEW argues that without a reciprocity protection for Illinois utilities, their employees and their customers, the only way the Illinois public utilities would be able to maintain their capital investments and meet their operating costs would be to either lay off employees jeopardizing the ability of Illinois' "electrical system" to "serve the public's interest" or to increase rates to smaller business and retail customers. IBEW contends either option would be fundamentally unfair to the employees of Illinois public utilities charged with performing the work necessary to provide reasonably priced energy to

customers in their employers' jurisdictions. IBEW further claims that either option would be unfair to most customers who would either see the quality of service provided to them decline or their bills rise at the same time as large or high end users get the least costly service secured by their long term power supply contracts with ARES. (IBEW brief at 6)

IBEW contends that the Illinois General Assembly did not pass the 1997 Amendments to the Act to threaten the rate of return of Illinois utilities nor to find that its experiment in opening up competition in the electric services market made most Illinois residents poorer by increasing their costs while lowering costs to a small number of high use customers with the luxury to purchase from non-Illinois utility ARES. IBEW claims that to avert that result, the General Assembly inserted the reciprocity provision so that Illinois utilities could, just like ARES coming into Illinois to seek high end users of electricity as customers, seek high end users in the jurisdiction served by the utility affiliated with the ARES applicant. (IBEW brief at 6)

IBEW notes that in Docket No. 01-0174, the Commission entered an April 6, 2001 Order finding that the position of Joint Intervenors and the IBEW would "render meaningless the qualifying term 'physically and economically delivered'" in Section 16-115(d)(5). IBEW disagrees with the Commission's conclusion in that docket. IBEW argues that there is nothing in the "physically and economically delivered" language that suggests that they are exceptions to or exemptions from the reciprocity requirements; rather IBEW believes it is equally arguable that the "physically and economically delivered" clause imposes additional requirements on the ARES before it may enter the Illinois retail electric supply market. (IBEW brief at 7)

It is IBEW's position that the Order in Docket No. 01-0174 is not a proper mechanism for circumventing the General Assembly's goal of making a smooth transition to a competitive market in Illinois by requiring reciprocity in the jurisdictions in which non-Illinois utilities and their affiliates operate. IBEW claims the reciprocity provision in the 1997 amendments does not provide for the "physically and economically delivered" exemptions claimed by WPS in the present case, and these words should not be used to destroy the carefully considered framework in which the General Assembly intended retail competition to open up the electricity market in Illinois to non-Illinois utilities or their affiliates. IBEW recommends that the Commission reject WPS' Application for certification to be an ARES in the geographic areas presently served by ComEd and IP. (IBEW brief at 7-8)

IEA argues that the Electric Service Customer Choice and Rate Relief Law of 1997 resulted from one of the most inclusive collaborative efforts in modern Illinois legislative history. IEA says that all stakeholders who participated in that process and who eventually supported passage of the law engaged in the give and take of negotiations. IEA represents that no stakeholder achieved everything it was seeking and in the spirit of compromise, many stakeholders accepted provisions they had previously opposed in exchange for provisions they deemed critical to their interest.

IEA asserts the reciprocity provisions found in Section 16-115 were among those critical provisions necessary for utility industry support of the bill. (IEA response at 1)

IEA contends the General Assembly intended the reciprocity provisions to be an integral part of the measured transition to competition set forth in the law, based on the fundamental concept that it would be unfair during the "delicate" move to a competitive marketplace to allow one-way competition and thereby place Illinois-based companies at a disadvantage when compared to energy providers and/or their affiliates from states that had not yet deregulated. IEA claims that these provisions were not meant to stifle competition but only to assure that it was conducted in a fair manner on the proverbial level-playing filed. (IEA response at 1)

IEA states that several members of the industry believe that legislative changes are needed to the reciprocity provision and continue to argue that these changes be made. IEA says the industry urges the Commission to honor the intent of the law and the legislative sponsors while working with all stakeholders to address proposed changes. (IEA response at 1)

B. Joint Legislator Intervenors' Position

Joint Legislator Intervenors (Representatives Granberg, Novak and Persico, and Senator Jacobs) believe that the Commission's interpretation of Section 16-115(d)(5), contained in its April 18, 2000 Order in Docket No. 00-0199, was contrary to the General Assembly's intent of the reciprocity provision and caused the Commission to incorrectly grant WPS' application to become an ARES. (Joint Legislator Intervenors response at 1)

Joint Legislator Intervenors state that the Commission accepted WPS' argument that Section 16-115(d)(5) allows an out-of-state power company to compete in Illinois so long as it can demonstrate that it is either economically or physically inefficient for Illinois power companies to provide electricity in WPS' service area. (Id. at 1, citing Docket No. 00-0199, Order at 9, April 18, 2000)

Joint Legislator Intervenors assert that Section 16-115 was added to solidify the support of two very important stakeholders, the IBEW and member companies of the Illinois Energy Association. Joint Legislator Intervenors claim that without the support of these parties, the Act would not have become law and Illinois would not enjoy the benefits of lower electricity rates and its relatively smooth transition toward retail electricity competition. (Id. at 2)

Joint Legislator Intervenors contend that Section 16-115(d)(5) was added by the General Assembly as an integral part of the measured transition to competition. They claim that the purpose of the reciprocity provision is not to stifle competition, but to assure that competition in the Illinois electricity market is conducted on a level playing field. These Intervenors assert that through the reciprocity provision, the General Assembly recognizes that it would be fundamentally unfair to allow out-of-state power

companies to sell electricity in Illinois, but not require the out-of-state power companies to reciprocate. They claim that the reciprocity provision fosters the establishment of new sources of generation in Illinois in order to forestall a situation similar to California, which they say is substantially reliant on out-of-state generation sources. (Id. at 2-3)

Joint Legislator Intervenors believe that the Commission captured the General Assembly's overall intent for Section 16-115(d)(5) in two statements made in its March 16, 2001 Order Reopening Proceeding in Docket No. 00-0199. First, they claim the Commission reasonably concluded that the General Assembly added the reciprocity provision "to ensure that any entity which availed itself of the newly created business opportunities provides for the creation of similar opportunities to those it enjoys under [the Act]." (Id. at 3, citing Docket No. 00-0199, Order Reopening Proceeding at 2, March 16, 2001) Second, Joint Legislator Intervenors report that the Commission stated:

> The General Assembly may well have believed that a business entity which is affiliated with an electric public utility should not be allowed to purchase delivery services for electric power and energy, irrespective of where the electricity was initially generated, unless the business entity's retail affiliate (or nominally non-affiliated utility for whom the business entity served as a retail sales conduit) made delivery services available over which electric power and energy (once again, irrespective of where the electricity was generated) could be delivered by third parties to the electric utility's retail customers.

Joint Legislator Intervenors believe, taken together, these statements reflect the General Assembly's intent for Section 16-115(d)(5), without the qualifying terms. (Id.)

Joint Legislator Intervenors claim that their interpretation of the reciprocity provisions is consistent with the opinions of one legal scholar who has analyzed Section 16-115(d)(5). They report that a recent Indiana Law Review stated "[i]f an ARES, its affiliate, or its principal source of electricity owns or controls facilities for the distribution and transmission of electricity in its own defined service territory, then that ARES *must* provide reasonably comparable delivery service to the electric utility in whose service area the proposed service will be provided by the ARES." (Id., citing Kelly A. Karn, Note, *State Electric Restructuring: Are Retail Wheeling and Reciprocity Provisions Constitutional*, 33 Ind. L. Rev. 631, 641-42 (emphasis added by Joint Legislator Intervenors))

Joint Legislator Intervenors assert that Section 16-115(d)(5) bars any out-of-state power company, or its in-state affiliates, from selling or marketing electricity in the Illinois electricity market without equivalent concessions. They contend that the Commission's interpretation of the reciprocity provisions in its April 18, 2000 Order in this proceeding is inconsistent with the General Assembly's intent. (Id. at 4)

Joint Legislator Intervenors indicate that they are cognizant of statements made by certain stakeholders that the reciprocity provision is unconstitutional. Joint Legislator Intervenors state that they reserve comment on that issue for another day. They conclude that the Commission must give full effect to the reciprocity provisions as Joint Legislator Intervenors have described.

C. Senator Rauschenberger's Position

Senator Rauschenberger urges the Commission to avoid giving undue weight to representations of legislative intent and interpretations of Section 16-115(d)(5) that are being advanced more than three years after passage of the Electric Customer Choice and Rate Relief Act of 1997 that are contrary to the plain language of that Section of the Act. He says the comments of Joint Legislator Intervenors are not supported by any reference to documented legislative history, and fail to contain any discussion of the meaning of the qualifying terms "physically and economically delivered" that are contained in Section 16-115(d)(5) of the Act. Senator Rauschenberger claims that Joint Legislator Intervenors are calling on the Commission to simply ignore those words as if they were not in the Act at all. (Sen. Rauschenberger comments at 1-2)

Senator Rauschenberger indicates that it has been nearly a full year since the Commission issued its original order with respect to the certification of WPS as an ARES. He claims that at no time since that order has any party complained to the Commission, under procedures set forth in Section 16-115B(a) and (b) of the Act, that WPS is in non-conformance with either the Act or with the conditions of its certification. Senator Rauschenberger states that currently there are no specific allegations of non-conformance by WPS. (Id. at 2)

Senator Rauschenberger states that to the extent individual members of the General Assembly may disagree with the Commission's actions in administering the Act, such disagreement should address, first and foremost, the plain language of the Act, of which each and every word must be given equal effect. He asserts that Joint Legislator Intervenors take the opposite route and appear to suggest that certain words not be given effect. Senator Rauschenberger suggests that the Commission should be skeptical of long-delayed protests that urge the Commission to ignore certain portions of the language in the Act as being either contrary to or inconsistent with the intent of the General Assembly. (Id.)

It is Senator Rauschenberger's position that the principle of reciprocity set forth in the words of Section 16-115(d)(5) is not the absolute prohibition on ARES affiliation with non-open, non-Illinois utilities. Rather, he claims the reciprocity provision of the Act is more logical, symmetrical and attentive to actual energy market conditions. Senator Rauschenberger states that while the Act's reciprocity provision does disqualify some applicants for ARES certification whose non-Illinois utility affiliates do not provide delivery services comparable to those provided by Illinois utilities, the terms of disqualification are limited to those circumstance in which a given Illinois utility could not physically or economically delivery power and energy to the non-Illinois utility. He

asserts that the physical and economical test in the Act's reciprocity provision cannot be disregarded. (Sen. Rauschenberger comments at 2)

Senator Rauschenberger contends that it would make no sense to apply the reciprocity provision with respect to denial of ARES certification for an affiliate of a utility in a location that could not be physically served by the power and energy from the Illinois utility. He indicates examples of such situations might include an ARES affiliate of a distribution utility in a foreign country or in Texas. Senator Rauschenberger asserts that in neither case could an Illinois utility physically deliver power and energy. He claims that such an applicant would still be in full compliance with the reciprocity provision of the Act. He further asserts that the Act requires consideration by the Commission of whether a given Illinois utility could not economically serve, even if it could do so physically. (Id. at 2-3)

According to Senator Rauschenberger, since the passage of the Customer Choice Act, most of the high cost utilities in the Midwest (which are concentrated in Michigan and Ohio) who would be subject to the economic test in the reciprocity provision have commenced open access under their own states' laws. He claims that in this respect, to the extent the General Assembly intended to provide other states incentives to enact measures similar in effect to that of the 1997 Customer Choice Act, there has been considerable success. (Id. at 3)

Senator Rauschenberger claims that the Commission should not leave itself open to arguments that attempt to use current conditions as a rationale for action taken years before. He says Joint Legislator Intervenors appear to contend that the General Assembly had in mind the forestalling of a potential Californian-style electric crisis when it considered the purposes of the reciprocity provision in 1997. Senator Rauschenberger asserts that it is not credible to suggest that the General Assembly had any such situation in mind and that the issue in 1997 was a surplus of high cost generation, not an inadequate supply. (Id.)

D. CUB's Position

CUB recommends that the Commission send a letter to the General Assembly seeking clarification and consideration of the relevant statutory language at the earliest possible date. CUB states that if the General Assembly declines to consider the issue, then the Commission should hold an expedited rulemaking to consider the proper interpretation of the reciprocity clause, the filing requirements for ARES affected by it, and the standards that ought to apply. CUB asserts that a rulemaking could include a workshop process to involve all stakeholders in a collaborative effort to resolve issues. (CUB response at 2-3)

Until such time as a resolution is reached, CUB contends that the Commission should hold ARES applications from out of state utilities or their affiliates in abeyance, based on the Commission's present inability to rule on their qualifications without further clarification and definition of the applicable reciprocity standards. CUB suggests that

the applicants should be permitted to re-apply for certification once the standards have been resolved and clarified. (CUB response at 3)

CUB suggests that the best solution to the problem is to allow WPS to continue serving its current customers, but to suspend WPS' "current application" until such time that the legislature clarifies its intent and considers how best to deal with the issue of reciprocity. CUB claims that this would prevent WPS' current customers from being injured or inconvenienced, but would allow the General Assembly, the Commission, and interested parties to consider the legal, factual and policy issues without materially changing the status quo. (CUB response at 2)

E. WPS' Position

In response to the IBEW comments which are set forth above, WPS suggests that IBEW misunderstands or misapprehends Section 16-115(d)(5) and that IBEW misquotes the language of Section 16-115(d)(5). WPS indicates that IBEW quotes a portion of Section 16-115(d)(5) by inserting the word "or" between the words "physically" and "economically" in that Section, whereas the phrase correctly reads "physically and economically". (WPS reply at 2)

According to WPS, IBEW apparently believes that WPS is required to show that the "geographic area" in which it presently provides service is one "to which electric power and energy can be physically and economically delivered" by Illinois utilities. WPS asserts that it merely has to certify that power and energy cannot be physically and economically delivered by an Illinois utility, in whose service area or areas WPS proposes to provide service, to retail customers within the service territory of WPSC or, in the alternative, that WPSC will offer delivery service to Illinois utilities. (WPS reply at 2-3)

According to WPS, in Docket No. 01-0174 the Commission was called upon to review the position of certain intervenors who argued that Section 16-115(d)(5) absolutely bars the issuance of an ARES certificate if the ARES applicant or its corporate affiliate does not provide delivery services comparable to those offered by Illinois utilities. WPS asserts that in the instant proceeding, interpretations have been proposed by other intervenors which would render meaningless the qualifying term "physically and economically delivered". WPS states that Staff's Report is based upon the assumption that physical delivery is not necessary. WPS claims that Staff witness Larson implied that under the "new" interpretation of Section 16-115(d)(5), an affiliate of a Hawaiian utility would not be able to compete in Illinois if an Illinois utility could buy power wholesale in Hawaii and resell same to Hawaiian retail customers. (WPS brief at 8-9, citing Tr. at 73-74)

WPS complains that the Commission cannot fairly apply a different interpretation of Section 16-115(d)(5) to WPS than that which has been applied previously. WPS also claims that the Commission cannot define the reciprocity clause in a way that conflicts with the specific language in that clause. According to WPS, that language

specifically provides if the Commission finds that power and energy cannot be physically and economically delivered by Illinois utilities to the T&D system of the applicant or its affiliate, then the applicant may be certified regardless of whether the affiliate provides delivery services comparable to those offered by Illinois utilities. Thus, WPS concludes that the Commission's interpretation in Docket No. 01-0174 and the prior WPS case, as well as other cases involving applications for ARES status, are consistent with the law. (WPS brief at 9)

VI. COMMISSION'S AUTHORITY TO REOPEN PROCEEDING AND RELATED PROCEDURAL ISSUES

A. WPS' Position

On March 28, 2001, WPS filed a Motion to Set Aside Order Reopening Proceeding, along with a Memorandum of Law. WPS asserts that the Commission does not have the authority to enter the March 16, 2001 Order Reopening Proceeding or to revisit or question the certification of WPS in the manner proposed. WPS claims the March 16, 2001 Order Reopening Proceeding is also tantamount to an illegal rulemaking. WPS further asserts that the March 16, 2001 Order Reopening Proceeding and the procedure contemplated therein is an affront to WPS' property interest in the certification.

WPS contends that there is no legal basis for the Commission to rely upon the statutory provisions in Article X as it appears to do, because these statutes only pertain to public utilities and WPS is not a public utility. WPS states that Article XVI, conversely, includes those statutes that explain the Commission's "limited jurisdiction" or authority over ARES. WPS claims it is a limited authority because, for the most part, ARES are basically unregulated entities and are free to charge unregulated prices and act much like any other private business. Therefore, WPS concludes that the Commission can look only to Article XVI for its authority over ARES, and its authority or role as outlined in Sections 16-115, 16-115A, and 16-115B. (WPS Memorandum of Law at 11; WPS brief at 10-11)

WPS states that the Commission does have rulemaking authorities as noted in Section 16-115 and has, in fact, promulgated rules pertaining to certification in the form of Part 451. WPS asserts , however, that nowhere in the certification rules are there any provisions that address the physical or economical constraints in the reciprocity statute. WPS states that the certification rules also contain no provisions that govern whether other entities may participate in the certification process and no provisions that govern the manner and means in which they may participate. According to WPS, to the extent the Commission would now, through in an adjudicatory process construct new or different rules as part of Part 451, it has acted illegally. (WPS Memorandum of Law at 12; WPS brief at 11 and 13-15)

WPS contends that what authority the Commission has to revoke a certification is limited. WPS asserts that Section 16-115B(b) of the Act does give the Commission

the authority, but only after notice and hearing held on complaint or on the Commission's own motion, to alter, modify, revoke or suspend the certificate of service authority of an ARES for substantial or repeated violations of or non-conformances with the provisions of Section 16-115 or 16-115A. WPS indicates that the Commission can also order an ARES to cease and desist, or correct any violation of or non-conformance with the provisions of Section 16-115 or 16-115A. In the instant proceeding, WPS claims the Commission has not filed a complaint nor has it indicated, in the context of a motion, that WPS has violated Section 16-115 in any manner. (WPS Memorandum of Law at 12; WPS brief at 11)

WPS asserts Section 200.900 of the Rules of Practice do not in themselves allow the Commission to revisit the certification under these circumstances. WPS argues that the Commission must still point to enabling statutory authority that justifies its reconsideration of the certification. According to WPS, the Commission must comply with Section 16-115B and advise WPS in the manner required of any violation or non-conformance of the provisions in Sections 16-115 or 16-115A. WPS contends that the Commission has not done this, and it cannot alter or change Section 10-113 through its exercise of the power to make rules and regulations. (WPS brief at 11-12, citing Harton v. City of Chicago Department of Public Works, 234 Ill. Dec. 632, 703 N.E. 2d 493, 501-502 (Ill. App. 1998) and WPS brief at 13)

According to WPS, the Staff "arguments" in response to WPS' motion are inconsistent with the well known and applied principle that the plain and unambiguous reading of the statute should prevail. WPS asserts that there is nothing in Section 10-113 that would lead anyone to reasonably conclude it provides any amount of Commission authority over ARES.

WPS also argues that because the Commission failed to comply with Section 16-115B, because the expedited hearing denied WPS due process, because persons and parties were improperly permitted to intervene and submit comments, and for other reasons, WPS was not provided procedural due process and the Commission should terminate or dismiss this proceeding. (WPS brief at 16-20)

B. Positions of Enron and Blackhawk

Enron supports the positions set forth in WPS' Motion to Set Aside Order Reopening Proceeding. According to Enron, the Commission's authority regarding certification of ARES is limited to the authority set forth in Sections 16-115, 16-115A and 16-115B of the Act. Enron asserts that since the instant proceeding on reopening was not initiated pursuant to this authority, it is improper and contrary to law. (Enron response to WPS Memorandum of Law at 2)

Enron states that to the extent that the Commission intends for the policies and procedures adopted in the instant proceeding to apply to other ARES or applicants, the Commission has engaged in an improper rulemaking, contrary to law. According to Enron, the Act and due process require that the Commission follow the rulemaking

procedures set forth in the Illinois Administrative Procedure Act. (Id., citing 220 ILCS 5/16-115(d)(5), (f); 5 ILCS 100/1-70, 5 and Quantum Pipeline Co. v. Illinois Commerce Comm'n, 304 Ill. App. 3d 310, 319, 709 N.E.2d 950, 956 (3rd Dist. 1999))

Enron contends that the Commission's authority is limited by statute and that the Commission's Order reopening the instant proceeding is procedurally deficient and exceeds the Commission's authority. Enron concludes that the Commission should grant the Motion of WPS and set aside its Order Reopening Proceeding. (Id.)

Blackhawk asserts that the procedure employed by the Commission in reopening the instant proceeding violated the Act, the Commission's rules and the principle of due process. Blackhawk claims that the Commission's reliance upon Section 10-113 of the Act and Section 200.900 of its rules is misplaced. (Blackhawk brief at 11-12)

Blackhawk contends that the Order Reopening Proceeding is not contemplated under the Act or the Commission's ARES certification rules, and amounts to an illegal rulemaking. (Blackhawk brief at 12-15) According to Blackhawk, the Commission should have filed a complaint rather than issuing the Order Reopening Proceeding. (Blackhawk brief at 15-16) Blackhawk concludes that the procedure employed on reopening violates the Act. (Blackhawk brief at 17)

Blackhawk asserts that the admission of the Staff Report into the record violates the Act and the ARES certification regulations. (Blackhawk brief at 18) Blackhawk also contends that allowing other parties to participate in the instant proceeding is not contemplated by the Act or the Commission's rules. (Blackhawk brief at 18-20)

C. Staff's Position

According to Staff, the Commission's Order Reopening Proceeding is authorized by and consistent with Section 200.900 of the Commission's Rules of Practice and was properly entered by the Commission. Staff indicates that Section 200.900 of the Rules of Practice is void of any reference to a need to cite violations by WPS of any statute, rule or regulation in order to reopen this docket. Staff argues that to the extent that the public interest so requires, that alone provides the basis for the Commission's reopening of this matter. (Staff response to WPS Memorandum of Law at 1-2; Staff brief at 3)

Staff contends that the Order Reopening Proceeding refers to Section 10-113 of the Act as additional support regarding the need for notice and the opportunity to be heard when the Commission is giving consideration to rescinding, altering or amending its own order. The Commission's action in this regard, Staff argues, is completely consistent with the fundamental requirements of due process – all of which are being properly adhered to in this proceeding. (Staff response to WPS Memorandum of Law at 2; Staff brief at 3-4)

Staff indicates that Section 10-113 of the Act was enacted in 1986, 11 years before the Electric Service Customer Choice And Rate Relief Law of 1997 which, among other things, created for the first time the concept of ARES. Therefore, Staff claims it stands to reason why Section 10-113 of the Act makes no mention of ARES. Nevertheless, Staff states that the Commission was correct in recognizing, in its Order Reopening Proceeding, the need for notice and an opportunity to be heard by citing to Section 10-113 of the Act as additional support for how the Commission wants this matter to be conducted. (Staff response to WPS Memorandum of Law at 2; Staff brief at 4)

Staff asserts that to construe Section 10-113 of the Act as applying only to public utilities would absurdly limit the right to notice and an opportunity to be heard to public utilities. Staff argues that not only was the Commission correct in its Order Reopening Proceeding to extend these statutory rights to WPS in this proceeding, but it went beyond Section 10-113 of the Act by ensuring that WPS had notice of possible action by the Commission before any final action was taken. (Staff response to WPS Memorandum of Law at 2; Staff brief at 4)

Staff indicates that the Commission is charged with the administration and enforcement of the Act and that reviewing courts accord the Commission's interpretation great deference. (Staff response to WPS Memorandum of Law at 3, citing, Illinois Bell v. ICC, 282 Ill. App. 3d 672, 676 (1996); Metro Utility v. ICC, 262 Ill. App. 3d 266, 273 (1994)) Staff adds, "In fact, '[g]iven the broad statutory delegation of authority to the Commission, a court must rule on the Commission's interpretation of the statute if there is a reasonable debate as to its meaning. Peoples Gas, Light & Coke Co. v. ICC, 175 Ill. App. 3d 39, 52 (1988)" (Staff brief at 4-5)

Staff indicates that Section 10-108 of the Act has been cited with approval by the Illinois Appellate Court regarding the statutory due process procedures required when the Commission is giving consideration to rescinding, altering or amending its own order. (Staff response to WPS Memorandum of Law at 3, citing Quantum Pipeline Company et al v. ICC, 304 Ill App. 3d 310, 319 (1999)) Given the schedule for the submission of filings and the conduct of hearings, Staff claims the statutory due process required is being fully afforded in this matter and that no one has been precluded from the opportunity to participate. (Staff response to WPS Memorandum of Law at 3; Staff brief at 5-6)

Staff contends that this proceeding cannot be construed as an attempt by the Commission to change the existing ARES rules or make new and different ARES rules. (Id.) Staff asserts that the essence of this reopened proceeding is the Commission's consideration of the proper construction of Section 16-115(d)(5) of the Act as that statutory construction may relate to WPS. Staff claims that the Commission has the authority to so act. (Staff response to WPS Memorandum of Law at 3; Staff brief at 5)

With regard to the Commission's decision to open up the ARES certification process so as to provide other parties with an opportunity for input, Staff asserts that a

proper rationale for this decision is contained in the Order Reopening Proceeding. (Staff brief at 6, citing Order Reopening Proceeding at 3-4)

Staff indicates that pursuant to the Commission's Order Reopening Proceeding, Staff submitted its March 23, 2001, Staff Report and supporting affidavit. In addition, Staff submitted an affidavit on March 29, 2001, with its Comments in Reply to Other Parties' Responses to the Staff Report. Staff maintains that the economic methodologies and analyses contained in these affidavits should be considered by the Commission in its final determination on reopening. (Staff brief at 6-7)

D. IBEW's Position

In response to WPS' assertion that the impetus and timing for the Commission's March 16, 2001 Order Reopening Proceeding is not explained, IBEW contends that the Commission's Order Reopening Proceeding indicates the impetus and timing was WPS' filing of its certification of continued compliance with Section 16-115(d)(5) of the Act. (IBEW response to WPS Memorandum of Law at 1)

While WPS claims that the Commission's actions are tantamount to rulemaking, IBEW claims that the Commission, in the course of its certification procedures, has to consider the relevant statutory authority and, in doing so, interpret that authority. IBEW asserts that the Commission is simply engaged in case by case decision making just as other state and federal administrative agencies routinely do in order to construe the statutes regulating their procedural and substantive decisions. (IBEW response to WPS Memorandum of Law at 1)

According to IBEW, the Commission made clear to WPS and others that it has standing authority "at any time" upon proper notice to the public utility affected to "rescind, alter or amend any . . . order or decision made by it." IBEW states that while WPS claims that it is not a public utility, it wishes to act as a competitor to public utilities in Illinois by providing power to larger end users of energy. IBEW also argues that WPS is affiliated with Wisconsin Public Service Company, a public utility, in Wisconsin and should not be able to use its affiliate status to escape the "public utility affected" language of Section 10-113 of the Act. (IBEW response to WPS Memorandum of Law at 3-4)

The IBEW also asserts that the Commission's own rules provide that the Commission "may on its own motion, reopen any proceeding" where it believes "conditions of fact or law" have changed, so as to "require, or that the public interest requires, such reopening." (IBEW response to WPS Memorandum of Law at 4)

V. COMMISSION'S CONCLUSIONS

On April 18, 2000, an Order was entered by the Commission in Docket 00-0199 which granted, subject to certain conditions, an ARES certificate to WPS for the service territories of ComEd and three other electric utilities. The Commission granted

rehearing, but other parties chose not to participate, and the original decision was affirmed on July 6, 2000.

As explained in the Order of April 18, 2000, Applicant is an affiliate of Wisconsin Public Service Corporation ("WPSC") in Wisconsin, and Upper Peninsula Power Company in Michigan. These two affiliates own and control electric transmission and distribution facilities for public use and for delivery of electricity to end users in defined geographic regions in Wisconsin and Michigan. Neither of the affiliate's electric service territories are open to retail electric competition and customer choice at this time. Hence the reciprocity provisions of Section 16-115(d)(5), which are set forth in the instant Order above, come into play. In this context, the Order of April 18, 2000 reasoned that the question is whether electric power and energy "can be physically and economically delivered" to the service areas of Applicant's affiliates by the Illinois utilities in whose service territories the Applicant plans to offer service.

On March 16, 2001, the Commission entered an Order Reopening Proceeding in 00-0199 to consider and determine, on an expedited basis, whether it should rescind, alter or amend the Order it entered on April 18, 2000, with the scope of the reopening limited to further consideration of whether WPS meets the [reciprocity] standards set forth in Section 16-115(d)(5) of the Act.

The Order of March 16, 2001 also found (on pages 3-4) that in proceedings relating to ARES certifications, "The law does not prohibit the Commission from entertaining evidence or arguments from parties other than the applicant." Thus, the proceeding on reopening was open to participation by other interested parties. A number of parties have in fact participated on reopening, and have made a number of contributions to the record in this case, despite continuing objections from WPS that such parties should not be permitted to be heard.

With regard to the **meaning or intent of the reciprocity provisions** of Section 16-115(d)(5), and the criteria set forth therein, the positions of the parties are summarized above and will not be repeated in detail here. The IBEW concludes, "Based on the foregoing facts demonstrating that one way retail competition will be injurious to the rates of return of the two Illinois utilities in whose territory WPS has petitioned for certification as an ARES and the language of Section 16-115(d)(5) making reciprocity the law of the State without the exemptions alleged by WPS and determined to be present in the 1997 Act by the Commission in its Order in Case No. 01-0174, the Commission in the present case should deny WPS' petition for ARES certification." (IBEW brief at 8-9)

Representatives Granberg, Novak and Persico, and Senator Jacobs ("Joint Legislator Intervenors"), who formally intervened in this case, assert that Section 16-115(d)(5) bars any out-of-state power company, or its in-state affiliates, from selling or marketing electricity in the Illinois electricity market without equivalent concessions. They further contend that the Commission's interpretation of the reciprocity provisions

in its April 18, 2000 Order in this proceeding is inconsistent with the General Assembly's intent.

Senator Rauschenberger, on the other hand, contends that the principle of reciprocity set forth in Section 16-115(d)(5) is not an absolute prohibition on ARES affiliation with non-open, non-Illinois utilities. In his view, it would make no sense to apply the reciprocity provision with respect to denial of ARES certification for an affiliate of a utility in a location that could not be physically served by the power and energy from the Illinois utility.

According to WPS, the plain language in Section 16-115(d)(5) specifically provides that if power and energy cannot be physically and economically delivered by Illinois utilities to the T&D system of the applicant or its affiliate, then the application may not be barred on the basis of non-compliance with the reciprocity provisions of Section 16-115(d)(5) regardless of whether the affiliate provides delivery services comparable to those offered by Illinois utilities.

In arriving at a decision on the issue of the meaning and intent of the reciprocity provisions of Section 16-115(d)(5), the Commission observes that this question was very recently considered by the Commission in the Blackhawk proceeding, Docket No. 01-0174. In its order entered April 6, 2001, the Commission granted Blackhawk's application for an ARES certificate over the objections of the IBEW, who intervened, and Representatives Granberg and Novak, who also intervened and were referred to as Joint Intervenors. In rejecting the arguments of the IBEW and Joint Intervenors on page 22 of the Order in Blackhawk, the Commission found, in part, "The Commission rejects Joint Intervenors' and the IBEW's position since it is contrary to the plain language of Section 16-115(d)(5)." The Commission added, "Joint Intervenors' and the IBEW's interpretation would render meaningless the qualifying term 'physically and economically delivered'."

Having reviewed the arguments of the parties in the instant case, the Commission notes that the interpretation of Section 16-115(d)(5) advanced by the Joint Legislator Intervenors and the IBEW is essentially similar to the position that was argued by them and rejected by the Commission on April 6, 2001 in Docket 01-0174. Based on its analysis of the record in this case and the decision in Docket 01-0174, the Commission continues to believe that the Intervenors' interpretation, although well articulated in their comments and briefs, is contrary to the plain language of Section 16-115(d)(5) and would afford no meaning to the qualifying term "physically and economically delivered". Accordingly, their interpretation should not be adopted in the instant docket. Rather, the proper standard, as indicated in the Blackhawk order, is whether ComEd, IP, CIPS and CILCO can physically and economically deliver power and energy to the service areas of WPS' affiliates, and this issue is addressed below.

As indicated in the Commission's Order in the Blackhawk proceeding in Docket 01-0174, and in the conclusions in the instant order above, the question to be answered by the Commission at this time is **whether electric power and energy "can be**

physically and economically delivered" to the service areas of WPS' affiliates by the Illinois utilities whose service areas are the subject of WPS' application.

Based on the information presented in the original WPS proceeding, the Commission found in its Order of April 18, 2000 that it would not be economical, under any of the three analytical methods presented, for the Illinois utilities in question to deliver electric power and energy to the service areas of Applicant's affiliates. Accordingly, the Commission concluded that the reciprocity provisions of Section 16-115(d)(5) did not preclude the Applicant from receiving an ARES certificate.

On reopening, as discussed above, Staff observed that the WPS analyses calculated three different estimated costs for service by Illinois utilities to the service areas of WPS' affiliates, and then compared such costs to the "average cost" charged by the WPS affiliate to all industrial users. Staff asserted that because WPSC's retail rates contain demand charges, varying customer load factors can result in varying rates. Staff stated that ComEd's wholesale power costs do not vary as greatly with load factor as WPSC's retail costs because the retail costs include a demand charge while the wholesale costs do not.

In Staff's view, the average rate concept used by WPS does not properly consider the interplay of demand charges and customer load factors. Therefore, in its analysis on reopening, Staff "considered the impact on other than the average customer of WPSC." Staff believes its economic analysis demonstrates that ComEd, IP, CIPS and CILCO can economically serve some of WPSC's Cp-1 customers with load factors less than the class average.

WPS criticized the Staff analysis, primarily because Staff assumed that the cost for Illinois utilities to serve WPSC customers does not vary with load factor. WPS presented economic analyses in which both the WPSC rates and the cost for Illinois utilities to serve WPSC customers vary with load factor. WPS contends that its analyses demonstrate that no Illinois utility can economically serve WPSC customers.

As noted above, Staff's analysis assumes that wholesale power costs do not vary with load factor to the extent retail costs do, because the wholesale costs do not include a demand charge. WPS disputes this assumption by Staff. WPS claims that its survey of power suppliers indicates that the wholesale cost of supplying a customer with a lower load factor was greater than the wholesale cost of supplying a customer with a higher load factor.

The Commission notes that Staff's position on this issue, including the key assumptions in Staff's rationale, is essentially the same as that advanced by Staff in Docket No. 01-0174. In that proceeding the Commission concluded on page 22 of its Order:

> The basic premise for the analysis contained in Staff's Report is that wholesale power costs do not vary with load factors since a demand

> charge is required for retail power costs but is not required for wholesale power costs. This basic premise, however, is simply not true.

That order went on to state on pages 22-23:

> The Commission accepts Blackhawk's premise that the cost of wholesale electric power varies hourly, depending upon many factors, including: weather, units in service, and current fuel costs. Firm wholesale electric power products are priced to reflect these variations in costs. Staff's analysis in its Report fails to recognize this fact. While it is common for wholesale electric power contracts to not contain demand charges, the Commission notes that there has been no demonstration that any contracts have restrictions on load factor. Firm wholesale electric power contracts typically address the issue of load factors in one of several ways, including: a separate demand charge; a requirement that electric power is taken at a specified load factor (wholesale electric power is commonly sold in 100% load factor blocks for the on-peak hours of the period under contract, such as electric power purchased on the basis of the Cinergy Index.); or requiring that the purchaser take electric power within a specified range of load factors.

As observed above, the basic rationale for the Staff position in the instant proceeding, including the key assumptions, is essentially the same as that presented by Staff and rejected by the Commission in Docket No. 01-0174. Here, as in that proceeding, the Commission finds the basic premise of Staff's economic analysis -- that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs -- is not supported by the record.

Having reviewed the record in this proceeding, the Commission concludes that WPS has demonstrated that at the present time, it would be uneconomical for ComEd, IP, CIPS and CILCO to deliver power and energy to the retail customers of WPSC. The Commission believes that at the present time, WPS is in compliance with the reciprocity provisions of Section 16-115(d)(5) of the Act. Therefore, the Commission affirms the previously granted certificate and concludes this proceeding on reopening. The Commission also observes that under 83 Illinois Administrative Code 451.730, WPS is required to annually certify its compliance with the requirements of Section 16-115(d)(5) of the Act.

Before leaving this issue, the Commission wishes to make one other comment. In its analysis on reopening, the Staff, on short notice, provided the Commission with a well-explained alternative approach for the Commission's consideration in reaching a decision on the issue of economic delivery. So even though the Commission has not accepted the Staff methodology in the Blackhawk order or in this one, the Commission notes that Staff's analysis on reopening was of benefit in enabling the Commission to make an informed decision on this difficult issue.

Finally, the Commission will address arguments regarding the Commission's **authority to reopen this proceeding**, as well as those pertaining to due process. As explained above, WPS filed a motion to set aside the order reopening the proceeding. WPS asserts that the Commission does not have the authority to enter the March 16, 2001 Order Reopening Proceeding, or to revisit or question the certification of WPS in the manner proposed. WPS also argues, among other things, that the Commission failed to provide WPS with procedural due process because the Commission failed to comply with Section 16-115B, because persons and parties were improperly permitted to intervene and submit comments, and because an expedited schedule was used in this proceeding. Fellow ARES Blackhawk and Enron join WPS in some of these arguments. On the other hand, both Staff and IBEW assert that the Commission has the authority to undertake this reopened proceeding and that it was conducted in an appropriate manner.

The Commission's Order Reopening Proceeding has already disposed of several of these issues. For example, the Order Reopening Proceeding at pages 3 to 4 contains the Commission's rationale explaining why it is appropriate to consider input from entities other than just the applicant, and that rationale is hereby reaffirmed. On this point, the Commission finds it interesting that WPS would argue so passionately about the importance of due process while simultaneously strongly criticizing the Commission for allowing any other parties to participate in the process in any manner whatsoever.

With regard to the Commission's authority to reopen the case, the bases for exercising such authority are explained in the Order Reopening Proceeding and in Staff's responses to WPS' motion. Furthermore, the Commission observes that ARES have an obligation to "continue to comply with the requirements for certification stated in subsection (d) of Section 16-115." (220 ILCS 5/16-115A(a)(ii)) In addition, 83 Illinois Administrative Code 451.710 states in part:

> All ARES shall continue to remain in compliance with the provisions of the Act and this Part, as now or hereafter amended. If an ARES received a certificate before the effective date of any provision of this Part, which provision applies to applicants seeking certification to serve customers with the same electrical demand or usage characteristics as the ARES, the ARES must demonstrate that it has come into compliance with such provision no later than January 31 of the year following the year during which such amendment took effect.

Moreover, Section 451.730, entitled "Certification of Compliance with Section 16-115(d)(5) of the Act", expressly provides that the ARES "shall annually certify that it complies with the requirements of 16-115(d)(5) of the Act . . . . "

Clearly, both the statute and the Commission's rules require an ARES to continue compliance with applicable certification provisions, including the reciprocity

provisions. In any event, the Commission concludes that this proceeding was properly reopened, and that WPS' "motion to set aside" is denied.

With regard to due process concerns, the Commission notes that WPS received, among other things, the notice and order of reopening, notice of a hearing, a copy of the Staff Report, an opportunity to respond to the Staff Report, a copy of the Staff reply and an opportunity to respond to it, an opportunity to file motions, an opportunity to offer scheduling proposals and comment on those offered by others, an opportunity to present evidence and to cross-examine the Staff witness, an opportunity to file a post-hearing brief addressing all issues raised by any party, and an opportunity to file exceptions to the proposed order and replies to exceptions submitted by other parties. All things considered, the Commission believes that WPS' due process rights were not compromised in this proceeding.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record, is of the opinion and finds that:

(1) Applicant is organized under the laws of the State of Wisconsin, and is authorized to do business in the State of Illinois; Applicant has been granted authority to become an Alternative Retail Electric Supplier under Section 16-115 of the Act;

(2) the Commission has jurisdiction of the parties and subject matter herein;

(3) the facts recited and conclusions reached in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(4) the proceedings on reopening should be concluded, and the certificate granted in the Order entered April 18, 2000 should be affirmed, subject to the conditions set forth herein; further, except as otherwise provided herein, the Commission's findings in that Order regarding the "physical and economic delivery" criteria are affirmed.

IT IS THEREFORE ORDERED by the Commission that the proceedings on reopening are hereby concluded, and that the certificate granted in the Order entered April 18, 2000 is affirmed, subject to the conditions set forth therein and in the instant Order.

IT IS FURTHER ORDERED that Applicant shall comply with all applicable Commission rules and orders now and as hereafter amended, including but not limited to the annual certification of compliance requirements in Sections 451.710 and 451.730 of Part 451.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-110 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By proposed order of the Hearing Examiner this 19th day of April, 2001.

Hearing Examiner